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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1476

HENRY STARLEY,
Petitioner,

v.

CITY OF BIRMINGHAM,
A Municipal Corporation,
Appellee/Respondent.

MOTION TO DENY WRIT OF CERTIORARI TO REVIEW THE OPINION AND JUDGMENT OF THE ALABAMA COURT OF CRIMINAL APPEALS

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ERRATA IN PETITIONER'S BRIEF

Page	Error	Correction
5, paragraph 2	Section 16	Section 16-16
6, paragraph 1	breasts	breast
13, last paragraph, last 2 lines	Simonetti, supra, at page 173 Associated Industries, supra, at page 288	Simonetti, supra, at page 92 Associated Industries, supra, at page 889
14 - under 2	Simonetti, at 173, Associated Industries, at 289	Simonetti, at 92 Associated Industries, at 890
14 - under 3	Simonetti at page 173, Associated Industries at page 289	Simonetti at page 92, Associated Industries, at page 889
14 - under 4	Simonetti, at page 174, Associated Industries, at page 289	Simonetti, at page 92, Associated Industries, at page 890
14 - under 5	In Simonetti at page 175	In Simonetti at page 93
15 - under 6, 1st sentence	In Simonetti at page 177 cited in Associated Industries, at page 289	In Simonetti, at page 95 cited in Associated Industries, at page 890
15 - under 6, paragraph 2	In Simonetti, at page 172	In Simonetti, at page 90
16, first new paragraph	. . . Simonetti, at page 177	. . . Simonetti, at page 95

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The Appellee/Respondent respectfully prays that the Writ of Certiorari be denied Petitioner for review of the opinion and judgment of the Alabama Court of Criminal Appeals entered against him on October 16, 1979.

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals which is appended to the Petitioner's Argument and filed in this Honorable Court marked Appendix A is correct with the following exceptions:

Appendix A: The Alabama Court of Criminal Appeals' opinion contained no [1], [2], [3-5] or [6]. This opinion contains correct statements of the law.

Appendix B: The City of Birmingham adopts this as being a correct statement of Petitioner's denial of certiorari by the Supreme Court of Alabama.

Appendix C: Number 3 at page A.9 in Petitioner's Writ of Certiorari reads: City of Birmingham ORDINANCE, Sections 16-16 and 16-18 provide. The correct manner of referring to the sections of this ordinance is as follows:

City of Birmingham Ordinance No. 77-243, Section 16-16 or City of Birmingham Ordinance 16-16, as amended, and City of Birmingham Ordinance No. 77-243, Section 16-18 or City of Birmingham Ordinance 16-18, as amended, or as set forth in the following paragraph.

The complaint charged this Petitioner with violating Section 16-18 of the General Code of the City of Birmingham, Alabama, 1964, as amended, on to-wit: February 27, 1978 and Ordinance No. 77-243 became effective on, to-wit: December 2, 1977 and, therefore, the entire ordinance was operative on the date in question.

At the top of page A.10 the following was omitted:

"Article II. OBSCENITY.

The remainder of the page is correct with the exception that the definition of - Work or Matter at page A.11 is an older definition and not the one embodied in City of Birmingham Ordinance No. 77-243, Section 16-16 or City of Birmingham Ordinance 16-16, as amended, which reads as follows:

> "Work or Matter. Any book, magazine, newspaper or other printed or written material, performance or any picture, drawing, photograph, motion picture or other pictorial representation or any statue, figure of any recording transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials."

Also at page A.11 an older definition is cited, the correct quotation of City of Birmingham Ordinance No. 77-243 Section 16-18, or City of Birmingham Ordinance 16-18, as amended, states:

> "Publishing, printing, etc., prohibited.
>
> It shall be unlawful for any person to knowingly publish, print, exhibit, participate in the exhibition or performance of, or allow or permit the exhibition or performance of, distribute, or have in his possession with intent to distribute, exhibit, sell or offer for sale any obscene matter in the city or the police jurisdiction thereof."

JURISDICTION

This Court's jurisdiction *may* be invoked under Title 28 U.S.C.A. §1257(3). (Emphasis added)

The following portion of United States Supreme Court Rule 19 is material to the pending case. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor.

The issue raised by the Petitioner does not in the opinion of the writer present a new question for the first time nor present any special or important reason for granting a writ of certiorari. It appears that this case is not one of first impression and that the following quotation is applicable:

> "A cause which presents a new question for the first time, and for which, consequently, there is no precedent applicable in all respects, is a 'case of first impression.' *People* v. *Pestronk,* 157 N.Y.S.2d 492, 493, 3 Misc.2d 845."

QUESTION PRESENTED

Was the City of Birmingham Ordinance 16-18, as amended, systematically and selectively enforced or administered by the public authority of said City against Henry Starley with an evil eye and unequal hand which resulted in an unjust, illegal, intentional discrimination against him as compared with other persons in similar circumstances, thereby violating his rights under the equal protection clause of the Fourteenth Amendment to the Constitution of the United States of America.

STATEMENT OF THE CASE

The body of the complaint read as follows: (T. p. 171):

"Comes the City of Birmingham, a municipal corporation, and complains that Henry Starley, within twelve months before the beginning of this prosecution, on, to-wit: February 27, 1978, and within the City of Birmingham, or the police jurisdiction thereof, at to-wit: 7606 1st Avenue North, Pleasure Books East, knowingly and unlawfully sold an obscene book or magazine or matter entitled 'My Black Lover' to J. R. Walkinshaw which depicted or portrayed the following sexual conduct: Actual act or acts of homosexuality between males, fellatio contrary to and in violation of Section 16-18 of the General Code of the City of Birmingham, Alabama, 1964, as amended."

The Petitioner, Henry Starley, was tried commencing on the 17th day of May, 1978, at 3:00 p.m. (caption page in transcript) and the trial concluded with a guilty verdict on May 18, 1978, (T. p. 165) and Judgment Entry (T. p. 204).

Page seven (7) in Petitioner's brief referred to the case of *Simonetti* v. *City of Birmingham,* 55 Ala.App. 163, 314 So.2d 83, (1975). The City agrees that this case is material and that the following quotation at page 92 is a correct statement of the law.

> "All the cases recognize that a heavy burden rests on the defendant to establish conscious, intentional discrimination, but if successful in sustaining that burden, the defendant will be entitled to a dismissal of the prosecution as a matter of law. . . ."

The City contends this heavy burden has not been met by Petitioner in this case.

There are many cases dealing with the question of discriminatory enforcement of the law. The vast majority have concluded that to sustain a claim of discriminatory enforcement there must be evidence of intentional or purposeful discrimination. And the almost universal way of establishing such is by proof that the enforcement if by race, religion or some other improper classification or as the result of some other ill-motive such as possibly to embarass a political candidate or punish an enemy. In all cases the issue is the pattern of enforcement. The following cases all adhere to the above stated propositions:

1. *Oyler* v. *Boles,* 368 U.S. 448, 82 S.Ct. 501;
2. *Snowden* v. *Hughes,* 321 U.S. 1, 64 S.Ct. 397;
3. *Yick Wo.* v. *Hopkins,* 118 U.S. 356, 6 S.Ct. 1064;
4. *People* v. *Wegman's Food Market, Inc.,* 362 NYS2d 902;
5. *People* v. *Lofton,* 366 NYS2d 769;
6. *Goodman* v. *Kennedy,* 329 A2d 224;
7. *Mulhern* v. *McHenry,* 326 A2d 132;
8. *Gutknecht* v. *City of Sausalitio,* 117 Cal. Rptr. 782;
9. *People* v. *Dobbs Ferry Medical Pav. Inc.,* 332 NYS 186;
10. *State* v. *Solomon,* 254 S.C. 550, 141 SE2d 818;
11. *People ex rel Moylan* v. *Kur,* 350 NYS2d 990;

12. *United States* v. *Elliott,* 266 F.Supp. 318;

13. *State* v. *Deddens,* 542 P2d 1124;

14. *People* v. *Thomas,* 542 P2d 387;

15. *People* v. *Plamondon,* 236 NW2d 86;

16. *United States* v. *Brookshire,* 514 F2d 786.

Assuming arguendo that Henry Starley has carried his heavy burden and presented evidence which created a strong inference of discriminatory prosecution, then the government according to *Associated Industries of Alabama* v. *State,* 314 So.2d 879, 55 Ala. App. 277, is required to explain it away, if possible, by showing the selection process rested upon some valid ground. This the City of Birmingham has done. This transcript proves that the arrests made by the City involved subject matter containing actual sex acts, or obscene matter (not nudes or simulated sex).

At page 8 of Petitioner's brief he quoted *Sunday Lake Iron Co.* v. *Wakefield,* 247 U.S. 350, 38 S.Ct. 495. Omitted, however, was this sentence, "The good faith of such officers and the validity of their actions is presumed; when assailed, the burden of proof is upon the complaining party."

At the same page *People* v. *Utica Daw's Drug Co.* was quoted. It is also expressed at 225 NYS2d at p. 136, "It is only when the selective enforcement is designed to discriminate against the persons prosecuted without any intention to follow it up by general enforcement against others that a constitutional violation may be found."

REASONS FOR DENYING THE WRIT

No new substantial constitutional question is presented.

The Petitioner alleges systematic and selective enforcement of City of Birmingham Ordinance 16-18, as amended, against him which has resulted in purposeful and intentional discrimination and thereby violated his rights under the equal protection clause of the Fourteenth Amendment to the United States Constitution.

After closely examining the transcript there is no evidence to support his allegations. No clear standards exist for the quantum or type of proof sufficient to illustrate discriminatory enforcement of municipal ordinance. Three elements must be generally proven: (1) Selectivity in enforcement, (2) selectivity that is intentional, and (3) selectivity based on some invidious standards such as . . . other arbitrary classification. Annotation, 4 A.L.R. 3d 404, 410 (1965); 13 Proof of Facts 2d Section five (1977) and other authorities cited therein.

Officer Walkinshaw testified that on February 27, 1978 (date of Petitioner's sale of magazine to him) there were a total of three vice officers and a supervisor. Approximately one-quarter of his time was spent on obscenity and pornography. (T. p. 101) He was not ordered to make an arrest of a certain individual by his superior but the officer reviewed the material and took it to a magistrate for a determination of probable cause. (T. p. 28) No arrest was made on a movie just on the basis of nudity. (T. p. 31) (This is in conformity with *Jenkins* v. *Ga.*)

The Petitioner has the duty to prove that the public authority of the City of Birmingham enforced Birmingham City Ordinance 16-18, as amended, or as set forth in the complaint, against him with an evil eye and an unequal hand which resulted in an unjust and illegal discrimination against him violative of his rights under the equal protection clause of the Fourteenth Amendment. Henry Starley has failed to carry his heavy burden and thus has fallen short of his mark. It is insufficient merely to

show that other violators have not been prosecuted, that there has been a laxity in enforcement, or that there has been a conscious exercise of some selectivity in enforcement: *Oyler* v. *Boles,* 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962): *Snowden* v. *Hughes,* 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497 (1944); *Yick Wo.* v. *Hopkins,* 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); *Butler* v. *State,* Ala.Cr.App., 344 So.2d 203, 207 (1977); *Johnson* v. *State,* Ala.Cr.App., 335 So.2d 663, cert. denied, Ala., 335 So.2d 678 (1976).

No evidence exists in the record indicating an intentional selectivity based on an unjustifiable standard. The City of Birmingham didn't focus its prosecutional sights exclusively on the Petitioner. Again Henry Starley has not met his burden of proof. The issue of discriminatory enforcement was settled in *Robinson* v. *City of Birmingham,* 353 So.2d 528, cert. denied, 353 So.2d 534 (1977); *Robinson* v. *City of Birmingham,* 353 So.2d 534, cert. denied, Ala., 353 So.2d 535.

In *Jenkins* v. *Georgia,* 94 S.Ct. 2750, the judgment of the Supreme Court of Georgia was reversed and at page 2755 this Honorable Court said:

> "Our own viewing of the film satisfies us that 'Carnal Knowledge' could not be found under the *Miller* standards to depict sexual conduct in a patently offensive way. Nothing in the movie falls within either of the two examples given in *Miller* of material which may constitutionally be found to meet the 'patently offensive' element of those standards, nor is there anything sufficiently similar to such material to justify similar treatment. While the subject matter of the picture is, in a broader sense, sex, and there are scenes in which sexual conduct including 'ultimate sexual acts' is to be understood to be taking place, the camera does not focus on the bodies of the actors at such times. There is no exhibition whatever of the actors' genitals, lewd or otherwise, during these scenes.

> There are occasional scenes of nudity, but nudity alone is not enough to make material legally obscene under the *Miller* standards.
>
> Appellant's showing of the film 'Carnal Knowledge' is simply not the 'public portrayal of hard core sexual conduct for its own sake, and for the ensuing commercial gain' which we said was punishable in *Miller. Id.,* at 35, 93 S.Ct. at 2621. We hold that the film could not, as a matter of constitutional law, be found to depict sexual conduct in a patently offensive way, and that it is therefore not outside the protection of the First and Fourteenth Amendments because it is obscene. No other basis appearing in the record upon which the judgment of conviction can be sustained, we reverse the judgment of the Supreme Court of Georgia."

At page nine of Petitioner's brief he alleged that the uncontradicted evidence is arrests in the City of Birmingham for violation of its obscenity ordinance were directed only against operators or employees of adult book stores and adult theatres and there were eight such adult book stores. At the same time there were hundreds of drug stores, convenience stores, or other business establishments, non-adult book stores and magazine stands and that those publications depicted or described simulated and/or explicit sexual activity.

By inference, *Jenkins* v. *Georgia* draws a distinction between hard core sexual conduct and soft core sexual conduct, the former being punishable when the three criteria coalesce as enunciated in the landmark case of *Miller* v. *California,* 93 S.Ct. 2607. "Carnal Knowledge" contained nudity but the camera never focused on the bodies of the actors during the ultimate sex scenes. The "patently offensive" element in *Jenkins* v. *Georgia* was not found to exist by this Honorable Court and, therefore, the judgment of the Supreme Court of Georgia was reversed. Likewise the non-adult book stores and magazine stands whose employees had not been arrested by the

City of Birmingham for alleged violation of its obscenity ordinance (as set forth on page nine (9) of Petitioner's brief) apparently were engaged in the sale of material depicting soft core sexual conduct or pornography which did not meet the three *Miller* criteria during the time frame involved prior to the sale of "My Black Lover."

If a prosecutorial classification was made by the City of Birmingham in making obscenity arrests as alleged by the Petitioner at page nine (9) of his brief it was for hard core obscenity rather than soft core obscenity. The City of Birmingham's actions have not been arbitrary, capricious or discriminatory against Petitioner, Henry Starley, as compared with other persons in similar circumstances (other adult bookstores and adult theatres) nor has the public authority of the City of Birmingham administered the Birmingham obscenity ordinance against Petitioner with an evil eye or unequal hand.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should be denied the Petitioner by this Court to review the opinion and judgment of the Alabama Court of Criminal Appeals.

Respectfully submitted,

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